



INDIANA COURT OF APPEALS
ORAL ARGUMENT AT A GLANCE
INDIANA UNIVERSITY SCHOOL OF LAW—
BLOOMINGTON

SHAFER & FREEMAN LAKES ENVIRONMENTAL CONSERVATION CORPORATION v. JUSTIN
STICHNOTH AND CORRAINE STICHNOTH

Appeal from:
White Circuit Court
The Honorable Robert W.
Thacker, Judge

Oral Argument:
Monday, October 29, 2007
12:00 noon — 1:00 p.m.
30 minutes each side

TORT LAW

Did the trial court err when it denied Shafer's summary judgment motion on the issue of whether Justin was a licensee when he dove into Lake Shafer?

Did the trial court abuse its discretion when it denied Shafer's motion to bifurcate the trial on the issues of liability and damages?

Did the trial court abuse its discretion when it permitted expert testimony regarding Justin's impaired earning capacity?

Did the trial court abuse its discretion when it denied Shafer's motion to withdraw its nonparty defense?

CASE SYNOPSIS

Facts and Procedural History

On July 17, 2004, Justin Stichnoth, who was twenty-six years old at the time, was visiting his parents at their house located on Lake Shafer. During a conversation that day, Justin's father, Kerry Stichnoth, told Justin about a dredge pipe that Shafer & Freeman Lakes Environmental Conservation Corporation ("Shafer") had installed in the channel near their dock. Kerry explained that recently he had gotten his boat "hung up" on the dredge pipe. Shortly thereafter,

Justin took a running dive off of his parents' dock into the channel. Justin had frequently made shallow-water dives off of his parents' dock over the years. But that day, Justin struck his head on the dredge pipe, which was located on the channel floor approximately seventeen feet from the dock. As a result, Justin sustained fractures to three of his cervical vertebrae and a spinal cord contusion. Justin was initially rendered a paraplegic, but after months of rehabilitation, he was able to breathe on his own, walk, and lift his arms to his face.

Shafer & Freeman Lakes Environmental Conservation Corporation v. Justin Stichnoth and Corraine Stichnoth

CASE SYNOPSIS



On September 22, 2004, the Stichnoths filed a complaint against Shafer alleging that Shafer's negligence caused Justin's personal injuries. In particular, the Stichnoths alleged that Shafer was negligent in failing to warn that there was a pipe beneath the water's surface, in failing to mark the pipe so that it would be visible to users of the lake, and in failing to use reasonable care in dredging the lake. In its answer, Shafer denied the allegations of negligence and asserted that Justin's parents were liable for his injuries. Shafer named Justin's parents and Commonwealth Engineers, an entity that provided engineering expertise in the installation of the dredge pipe, as **nonparties** to this action.

On August 15, 2006, Shafer filed a **Motion for Summary Judgment** on the issue of whether Justin was an invitee or licensee of Shafer. (The answer to that question determines the level of care Shafer owed to Justin.) In addition, Shafer moved to bifurcate the trial on the issues of liability and damages. The trial court denied those motions following a hearing.

On October 6, Shafer filed a Motion to Exclude in Whole or in Part Plaintiffs' Expert Witness, Dr. Edward Berla. The Stichnoths hired Dr. Berla to testify regarding Justin's impaired earning capacity as a result of his injuries. The trial court denied Shafer's motion to exclude Dr. Berla's testimony.

On October 16, the jury trial commenced. On the final day of trial, when the parties were ready to discuss final instructions, Shafer moved to withdraw Kerry Stichnoth and Commonwealth

Engineers as nonparties. The Stichnoths objected, and the trial court denied the motion following argument. Accordingly, both nonparties were named on the verdict forms. After deliberations, the jury returned a verdict in favor of the Stichnoths in the amount of \$3,398,000. And the jury assessed fault as follows: Justin 50%; Shafer 30%; and Kerry Stichnoth 20%. The trial court entered judgment against Shafer in the amount of \$1,019,400. This appeal ensued.

Parties' Arguments

On the first issue, Shafer contends that it permitted Justin to use the lake but did not invite him to do so. As such, Shafer asserts that it does not owe Justin the duty of care owed an invitee, and the trial court should have granted its summary judgment motion. On the second issue, Shafer maintains that the trial court should have separated the issues of liability and damages for trial. Shafer contends that the jury's decision on liability was likely affected by the evidence of the severity of Justin's injuries. On the third issue, Shafer argues that Dr. Berla used an unscientific methodology in arriving at his opinion on Justin's earning capacity. Finally, Shafer contends that the trial court's denial of its motion to withdraw the nonparty defense deprived it of its "fundamental rights to be the master of its own destiny and, given the jury's fault allocation, clearly affected the verdict."

Case Synopsis (continued)

The Stichnoths contend that Justin was a public invitee of Shafer at the time of the accident and that the trial court did not err when it denied Shafer's summary judgment motion. The Stichnoths also contend that Shafer has not demonstrated any prejudice from the trial court's denial of its motion to bifurcate the issues of liability and damages for trial. The Stichnoths maintain that the trial court did not abuse its discretion when it permitted Dr. Berla's expert testimony regarding Justin's impaired earning capacity. And, finally, the Stichnoths assert that Shafer has not demonstrated any prejudice from the trial court's denial of its motion to withdraw its nonparty defense.

Glossary of Terms

Motion for Summary Judgment— A procedural device to resolve a dispute without a trial when there is no issue as to the facts that would determine the outcome and one party is entitled to judgment as a matter of law.

Nonparty—A person whom a defendant believes is liable to the plaintiff, but whom the plaintiff has not named as a defendant.

Opinion in this case expected:
By end of calendar year 2007

Please check the Court's website to read the opinion.

For more information, see
<http://www.in.gov/judiciary/appeals/>

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TODAY'S PANEL OF JUDGES

Hon. Edward W. Najam, Jr. (Monroe County), Presiding

- Judge of the Court of Appeals since December 1992

Edward W. Najam, Jr., of Bloomington, Monroe County, was appointed to the Court of Appeals by Governor Evan Bayh in 1992 and was retained by the electorate in 1996 and 2006.

Judge Najam graduated from the Indiana University High School in Bloomington, where he grew up, and attended Indiana University at Bloomington. At I.U. he earned a B.A. in political science, with highest distinction, in 1969, was elected to Phi Beta Kappa, and was elected Student Body President. Judge Najam earned his J. D. from Harvard Law School in 1972.

After admission to the Bar, he was Administrative Assistant to the Mayor of Bloomington for two years and an attorney in private practice for eighteen years. He served as a member of the Civil Justice Reform Act Advisory Group and the Local Rules Advisory Committee of the United States District Court for the Southern District of Indiana. He was a member of the Bloomington Rotary Club, the Greater Bloomington Chamber of Commerce, and President of the Monroe County Family YMCA Board of Directors.

As Chair of the Appellate Practice Section of the Indiana State Bar Association, he initiated the Appellate Rules Project, which culminated in a complete revision of the Indiana Rules of Appellate Procedure. In 2001, he

organized and co-chaired "Caught in the Middle: A National Symposium on the Role of State Intermediate Appellate Courts," attended by judges from twenty-two states, the first such national conference. He has served as a member of the Indiana Supreme Court Committee on Rules of Practice and Procedure (1995 to 2005) and the Indiana Supreme Court Judicial Technology and Automation Committee (1999 to 2005), and he represents the judiciary on the Indiana Department of Homeland Security Counter-Terrorism and Security Council.

In 2005 and 2006, Judge Najam was a member of the panel that judged the final oral argument of the Sherman Minton Moot Court Competition. Judge Najam is a member of the Indiana University School of Law – Bloomington Board of Visitors.

Judge Najam is a member of the American, Indiana, and Monroe County Bar Associations, a graduate of the Indiana Graduate Program for Judges, a Fellow of the Indiana and Indianapolis Bar Foundations, a member of Phi Delta Phi legal fraternity, and an Eagle Scout.

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

Today's oral argument is the 194th case the Court of Appeals has heard "on the road" since early 2000.

Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. Paul Mathias (Allen County)

- Judge of the Court of Appeals since March 2000

Paul D. Mathias was appointed to the Court by Governor Frank O'Bannon in March, 2000. Judge Mathias is a fifth generation Hoosier and grew up in Fort Wayne. He graduated from Harvard University, *cum laude*, in 1976 and from Indiana University School of Law – Bloomington in 1979, where he was a member of the law school's Sherman Minton Moot Court Team and *Order of Barrister*.

Judge Mathias practiced law for six years in Fort Wayne, concentrating in construction law, personal injury and appellate practice. In 1985, he was appointed Referee of the Allen County Small Claims Court, where he served until his

appointment as Judge of the Allen Superior Court – Civil Division by Governor Evan Bayh in 1989.

Judge Mathias served as an officer of the Indiana Judges Association from 1993 to 1999 and as its president from 1997 to 1999. He received the Centennial Service Award from the Indiana State Bar Association in 1996, and a Sagamore of the Wabash Award from two governors.

Judge Mathias, who was retained on the Court of Appeals by election in 2002, is married and has two sons.

The 15 judges of the Indiana Court of Appeals issue more than 2,500 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.



TODAY'S PANEL OF JUDGES

Hon. Cale J. Bradford (Marion County)

- Judge of the Court of Appeals since August 2007



Cale J. Bradford was appointed to the Court of Appeals by Governor Mitch Daniels and took his seat on August 1, 2007.

Prior to his elevation to the Court of Appeals, Judge Bradford served for more than 10 years as Judge of the Marion Superior Court, seven years in the criminal division and three in the civil division. He was twice elected presiding judge by his colleagues.

During this tenure, Judge Bradford chaired the Marion County Criminal Justice Planning Council, a group of local elected and appointed officials who recommended ways to improve the county's response to criminal justice problems, including jail overcrowding, staffing, and budget issues. His efforts led to the end of 30 years of federal oversight of the Marion County Jail and to security improvements at the county's Juvenile Detention Center.

Before joining the bench, Judge Bradford served in the Marion County Prosecutor's Office for two years, overseeing a staff of more than 100 attorneys. For five years, he was an Assistant United States Attorney for the Southern District of Indiana, prosecuting major felony drug trafficking cases. He engaged in the private practice of law from 1986 to 1991, and served as both a deputy prosecutor and public

defender during his career.

A native of Indianapolis, Judge Bradford received a B.A. in labor relations and personnel management from Indiana University-Bloomington in 1982 and his J.D. from Indiana University-Indianapolis in 1986. He is the Court of Appeals' liaison to the Indiana Judges Criminal Instructions Committee, which provides guidance to judges on jury instructions in criminal cases, and a former member of both the Indiana Judges Criminal Policy Committee and the Board of Directors of the Indiana State Judicial Conference. He is a Distinguished Fellow of the Indianapolis Bar Association and has taught ICLEF seminars on trial practice for more than 10 years. From 2005 to 2007, Judge Bradford hosted "Off the Bench with Judge Cale Bradford," a legal commentary program on Marion County's government access network. He also served on the Judicial Technology and Automation Committee (JTAC), helping to draft the state judiciary's policies on technology and electronic case management.

Judge Bradford is a former director of Indianapolis's John P. Craine House, a residential alternative to incarceration for women offenders with pre-school-aged children. He is a member of the Lawrence Youth Football League Advisory Board of Directors and the Lawrence Men's Soccer Booster Club. He and his wife, a full-day kindergarten teacher, have five children.

ATTORNEYS FOR THE PARTIES

For Appellant, Shafer & Freeman Lakes Environmental Conservation Corporation:

Edward F. Harney, Jr.
Hume Smith Geddes Green & Simmons, LLP
Indianapolis



Originally hailing from the Region, **Edward F. Harney, Jr.** received his Juris Doctor degree, *magna cum laude*, from Valparaiso University in 1993 and a Bachelor of Arts degree from Purdue University in 1990. Mr. Harney has been a partner at Hume Smith Geddes Green & Simmons, LLP since 1998, and oversees the firm's information technology needs.

Mr. Harney focuses his legal practice on civil trial work and small business law. In his trial work, he has represented clients in a wide array of civil tort matters including automobile collisions, premises and products liability, dram shop, environmental issues, mass tort litigation and business transactions. He is also actively involved with numerous first party and third party insurance disputes and routinely provides coverage opinions to insurers and businesses. For his small business clients, Mr. Harney assists in selecting and forming their corporate entities as well as in their general business needs, including counseling, contracts, leasing and employment issues and litigation.

In addition to work at the trial level, Mr. Harney has represented numerous clients before the Indiana Court of Appeals and the Indiana Supreme Court. Of note, he has successfully participated in the reported decisions of *Argabright v. R.H. Marlin, Inc.* (construction law), *Smock v. American Equity Insurance Company* (coverage), *Arnold v. FJ Hab, Inc.* (premises liability), *Johnson v. Colip* (securities law), and *Irvine v. Schaeffer* (wild animal liability). He also successfully argued the oft-cited decision in *Bagley v.*

Insight Communications (general contractor liability) before the Indiana Supreme Court.

While in law school, Mr. Harney participated in both law review and moot court. His Giles Sutherland Rich moot court team advanced to the national competition in Washington D.C. after winning the regional competition, where he was named best oral advocate while the two person team's briefs were awarded top appellate brief awards.

Mr. Harney is a member of the Indiana State Bar Association, the Indianapolis Bar Association and the Defense Trial Counsel of Indiana. He and his wife, Christina, are also members of the Emmanuel Church in Greenwood, Indiana. Mr. Harney was a proud member of the former Indianapolis Athletic Club where he sat on the Board of Directors and was an avid, albeit not incredibly talented, basketball player. He is also an Eagle Scout and a Vigil member of the Order of the Arrow.

In the warmer months, Mr. Harney drives a 1000-horsepower alcohol injected big block dragster in NHRA competition and aspires to one day drive a Top Fuel Funny Car. He currently competes along side his 15-year-old daughter, Alexis, who drives her own junior dragster. Mr. Harney is counting the days to when his young children, Trey and Gabrielle, can join him and their big sister on the NHRA circuit.

ATTORNEYS FOR THE PARTIES

For Appellees, Justin Stichnoth and Corraine Stichnoth:
William E. Winingham
Wilson Kehoe & Winingham
Indianapolis



William E. Winingham graduated from Indiana University with a B.A. in 1975 and the Indiana University School of Law-Indianapolis in 1979. He is admitted to practice before the Indiana courts and the U.S. District Courts for the Northern and Southern Districts of Indiana.

Mr. Winingham served as a Deputy Prosecuting Attorney in Marion County from 1979 to 1982 and as Assistant U.S. Attorney for the Southern District of Indiana from 1982 to 1985.

His areas of practice include Brain and Spinal Cord Injuries; Vehicle Accidents; Products Liability; Fire and Explosion; and Insurance Bad Faith cases.

He was awarded the Indiana Trial Lawyer of the Year in 2002. Mr. Winingham has been an Indiana Super Lawyer four times—in 2005, 2006, 2007, and 2008, and named one of the Best Lawyers in America in 2005, 2006 and 2007.

Mr. Winingham is a member of the Indianapolis, Indiana State and American Bar Associations, the Indiana Trial Lawyers Association, and the Association of Trial Lawyers of America.

Mr. Winingham is the author of "Working with the Grieving Client," ICLEF, 1989; "Nursing Services Provided to the Plaintiff by Family Members - The Neglected Damage Element," Indiana Trial Lawyers Association Seminar, 1989; "Depositions: Strategies, Tactics & Mechanics," Professional Education Systems, Inc. Seminar, 1990; "Plaintiff's Perspective in Premises Liability Cases," Indianapolis Bar Association, 1992; "Plaintiff's Perspective in Personal Injury Litigation Practice in Indiana," National Business Institute, Inc. Seminar, 1993; "Dealing with Expert Witnesses," ICLEF, 1993; "Bad Faith Litigation," National Business Institute, Inc. Seminar, 1995; "Expert Evidence Under Rule 702 and Daubert," ICLEF, 1996; "Surviving Daubert Issues in Federal Court", ITLA, 2000; "64 Tips for Punitive Damages", ICLEF, 2002; "Indiana Bad Faith Litigation", NBI, 2003; "Wrongful Death in Indiana," ICLEF, 2004; "Bad Faith Litigation in Indiana," ITLA, 2004; "Using Mock Trials and Focus Groups," ITLA, 2005; "Use of Video, Computer Animation and Models," Lifetime Achievement Seminar/ITLA, 2006.